

STATE OF MICHIGAN
IN THE SUPREME COURT

KRISTINE COWLES, an individual, on behalf
of herself and all others similarly situated,

Plaintiff/Appellee,

v

BANK WEST, a state savings bank, f/k/a Bank
West, F.S.B.,

Defendant/Appellant,

and

KAREN B. PAXSON, an individual, on behalf
of herself and all others similarly situated,

Plaintiff-Intervenor/Appellee,

v

BANK WEST, a state savings bank, f/k/a Bank
West, F.S.B.,

Defendant/Appellant.

John E. Anding (P30356)
DREW, COOPER & ANDING
Attorneys for Plaintiff/Appellee
300 Ledyard Building
125 Ottawa Avenue, N.W.
Grand Rapids, Michigan 49503
616-454-8300

Phillip C. Rogers (P34356)
Attorneys for Plaintiff/Appellee
336 Trust Building
40 Pearl Street, N.W.
Grand Rapids, Michigan 49503
616-776-1176

William K. Holmes (P15084)
John J. Bursch (P57679)
Gregory M. Kilby (P68266)
WARNER NORCROSS & JUDD LLP
Attorneys for Defendant/Appellant
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503
616-752-2000

BRIEF OF DEFENDANT-APPELLANT BANK WEST

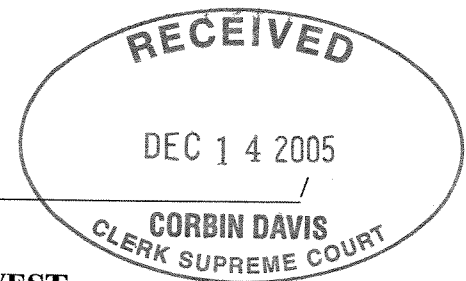


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
BASIS OF JURISDICTION AND RELIEF REQUESTED	vi
QUESTIONS INVOLVED.....	vii
INTRODUCTION	1
STATEMENT OF FACTS AND PROCEEDINGS	2
<i>The Cowles Loan</i>	2
<i>The Purpose of the Document Preparation Charge</i>	2
<i>The Trial Court Dismisses Ms. Cowles' Initial TILA Claim</i>	4
<i>Ms. Cowles' Amended (and Untimely) TILA Claim</i>	5
<i>Ms. Paxson's Intervening (and Untimely) TILA Claim</i>	5
<i>The Trial Court Holds Ms. Paxson's Claim Time Barred</i>	6
<i>The Court of Appeals' Ruling</i>	7
STANDARD OF REVIEW	11
ARGUMENT	11
I. Class Action Tolling Should Not Extend to a Claim That Was Not, and Could Not Have Been, Asserted by a Class Representative	11
A. The class action tolling doctrine was designed to encourage a class member to rely on the claims asserted by her class representatives, rather than filing a separate lawsuit, but only if the class member's own claims are identical to those of the representatives.....	12
B. The policies embodied in the class action tolling doctrine do not support an extension of that doctrine to claims that were not, and could not have been, brought by the class representatives	14
C. The Court of Appeals erred when it allowed Ms. Paxson to take advantage of the class action tolling doctrine when a TILA claim was not, and could not have been, asserted in Ms. Cowles' initial complaint.....	18

	<u>Page</u>
II. A Document Preparation Charge is “Bona Fide” If the Services For Which the Charge Was Received Were Actually Performed.....	23
A. This Court should use an objective test for determining whether a charge was “bona fide” for purposes of TILA.....	23
B. The subjective belief test for determining whether a document preparation charge is “bona fide” is inconsistent with TILA’s purpose and is an unworkable and nonsensical standard.....	27
C. Even under the subjective belief test, the TILA claim should be dismissed.....	30
CONCLUSION.....	30

TABLE OF AUTHORITIES

Page

Federal Cases

<i>American Pipe & Constr Co v Utah</i> , 414 US 538 (1974).....	passim
<i>Andrews v Orr</i> , 851 F2d 146 (CA 6, 1988)	17
<i>Brannam v Huntington Mortgage Co</i> , 287 F3d 601 (CA 6, 2002)	passim
<i>Burnett v New York Central R Co</i> , 380 US 424 (1965).....	13
<i>Cooper v Fed Reserve Bank of Richmond</i> , 467 US 867 (1984).....	19
<i>Crown, Cork & Seal Co v Parker</i> , 462 US 345 (1983).....	13
<i>Elscint Ltd Sec Litig</i> , 674 F Supp 374 (D Mass, 1987)	16
<i>Fleming v Bank of Boston Corp</i> , 127 FRD 30 (D Mass, 1989).....	17
<i>Flower Cab Co v Petite</i> , 1987 WL 14715 (ND Ill, July 21, 1987).....	18
<i>Guisse v BWM Mortgage, LLC</i> , 377 F3d 795 (CA 7, 2004)	23, 24, 25, 30
<i>Haas v Pittsburgh Nat'l Bank</i> , 526 F2d 1083 (CA 3, 1975)	22
<i>Household Credit Servs, Inc v Pfennig</i> , 124 S Ct 1741 (2004).....	27
<i>In re Colonial Ltd P'ship Litig</i> , 854 F Supp 64 (D Conn, 1994).....	16
<i>Int'l Union of Elec Radio & Mach Workers</i> , 429 US 229 (1976).....	14
<i>Johnson v Ry Express Agency, Inc</i> , 421 US 454 (1975).....	13, 15, 18
<i>Korwek v Hunt</i> , 827 F2d 874 (CA 2, 1987)	17

	<u>Page</u>
<i>NLRB v California Sch of Prof'l Psychology</i> , 583 F2d 1099 (CA 9, 1978)	11
<i>Order of RR Telegraphers v Railway Express Agency</i> , 321 US 342 (1944)	11
<i>Robbin v Fluor Corp</i> , 835 F2d 213 (CA 9, 1987)	17
<i>Salazar-Calderon v Presidio Valley Farmers Ass'n</i> , 756 F2d 1334 (CA 5, 1985)	17
<i>Southwire Co v JP Morgan Chase & Co</i> , 307 F Supp 2d 1046 (WD Wis, 2004)	15
<i>United States v Kubrick</i> , 444 US 111 (1979)	11
<i>Weston v Ameribank</i> , 265 F3d 366 (CA 6, 2001)	15
<i>Young v 1st American Fin Servs</i> , 992 F Supp 440 (D DC, 1998)	24

State Cases

<i>Abela v Gen'l Motors Corp</i> , 469 Mich 603; 677 NW2d 325 (2004)	11
<i>Adair v State</i> , 470 Mich 105; 680 NW2d 386 (2004)	11
<i>Bement v Grand Rapids & I Ry Co</i> , 194 Mich 64; 160 NW 424 (1916)	11, 23
<i>Bigelow v Walraven</i> , 392 Mich 566; 221 NW2d 328 (1974)	11
<i>Cowles v Bank West</i> , 263 Mich App 213; 687 NW2d 603 (2004)	passim
<i>Cunningham v Insurance Co of North America</i> , 530 A2d 407 (Pa, 1987)	16
<i>Hess v IRE Real Estate Income Fund, Ltd</i> , 629 NE2d 520 (Ill Ct App, 1993)	16
<i>Janes v First Fed Sav & Loan Assoc</i> , 312 NE2d 605 (Ill, 1974)	24

	<u>Page</u>
<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999).....	11
<i>Meece v Meece</i> , 223 Mich App 344; 566 NW2d 310 (1997).....	20
<i>Mehelas v Wayne Co Cmty College</i> , 176 Mich App 809; 440 NW2d 117 (1989).....	18
<i>Smith v Henry Ford Hosp</i> , 219 Mich App 555; 557 NW2d 154 (1996).....	20
<i>Waltz v Wyse</i> , 469 Mich 642; 677 NW2d 813 (2004).....	25

Statutes

15 USC 1605(a)	5, 7
15 USC 1605(e)(2).....	7, 26
15 USC 1638.....	4
15 USC 1640(e)	4, 5, 21
MCL 600.5813	20
MCL 600.5851(1)	21

Other Authorities

12 CFR 226.4(c)(7).....	5, 7, 24, 26
Committee Comments to 1983 revision of former GCR 1963, 208.6	12
Martin Dean & Webster, <i>Michigan Court Rules Practice</i> , MCR 3.501	12
MCR 1.105.....	20, 21
MCR 2.118(A)(2)	22, 23
MCR 2.118(D)	6, 18
MCR 3.501(A)(1)(c)	19
MCR 3.501(D)(5)	19
MCR 3.501(F).....	passim
MCR 3.501(F)(1)	6, 18
MCR 7.301(A)(2)	vi

BASIS OF JURISDICTION AND RELIEF REQUESTED

Bank West appeals under Michigan Court Rule 7.301(A)(2) the decision and order of the Court of Appeals in *Cowles v Bank West*, 263 Mich App 213; 687 NW2d 603, dated August 5, 2004, App 229a, which reversed in part and affirmed in part the decision of the Kent County Circuit Court dated January 24, 2000, App 225a. This Court granted Bank West's Application for Leave to Appeal on October 19, 2005.

Bank West asks this Court to reverse the Court of Appeals and to reinstate the judgment of the Circuit Court, which correctly held that the class action tolling doctrine does not toll a claim of a class member that was not, and could not have been, brought by the class representative. Bank West further asks this Court to reverse the Court of Appeals and use an objective test for determining whether a loan document charge is "bona fide" for purposes of the charge's exclusion from a lender's APR computation under the Truth in Lending Act. Alternatively, Bank West respectfully requests that this Court peremptorily reverse and summarily adopt the dissenting opinion below of Judge O'Connell.

QUESTIONS INVOLVED

1. Does the filing of a class action lawsuit toll the statute of limitations for a class member's individual claim, where that claim was not, and could not have been, asserted by the class representative?

The Court of Appeals answered: yes.

The trial court answered: no.

Appellant answers: no.

2. Should Michigan follow the Truth in Lending Act's plain language and purpose and use an objective test for determining whether a loan document charge is "bona fide" for purposes of the charge's exclusion from a lender's APR computation?

The Court of Appeals answered: no.

The trial court did not reach this question.

Appellant answers: yes.

INTRODUCTION

Plaintiff Karen Paxson seeks to resurrect a Truth in Lending Act (“TILA”) claim against Defendant Bank West filed after the limitations period expired. Ms. Paxson claims the limitations period was tolled by a class action lawsuit against Bank West in which Ms. Paxson was a class member. But the class action tolling doctrine is inapplicable here, because a TILA claim was not, and could not have been, made by the class representative, an indispensable requirement for the doctrine to apply. As Judge O’Connell recognized in dissent below, Ms. Paxson’s theory “permits class litigants to ignore completely statutes of limitations as long as they can continue to muster fresh ‘class’ plaintiffs with plausible causes of action stemming from the same general circumstances alleged in the complaint. . . . This approach allows a massive suit, brimming with countless phantom plaintiffs, to rise repeatedly from its own ashes like a litigious Phoenix until a vexed and exhausted defendant finally pays it enough money to haunt someone else.” *Cowles*, 263 Mich App at 239-240; 687 NW2d 603, App 239a. This Court should reject Ms. Paxson’s novel theory and reinstate the trial court’s summary disposition order.

Wholly aside from the limitations problem, Ms. Paxson’s TILA claim lacks legal merit. The claim arises out of Bank West’s past practice of charging \$250 for document preparation in its residential real estate mortgage transactions and disclosing that charge as a separate line item expense, rather than including it in the loan’s APR calculation. The question presented is whether a subjective or objective test should be applied to determine if the charge was “bona fide,” thus warranting exclusion from the loan’s APR. This Court should use the objective test, which comports with the statute’s plain language and Congressional purpose, and which the Seventh Circuit Court of Appeals recently endorsed. Again, summary disposition in favor of Bank West is appropriate.

STATEMENT OF FACTS AND PROCEEDINGS

The Cowles Loan

Plaintiff Kristine Cowles applied to Bank West for a home mortgage loan in December 1996. At the February 7, 1997 closing, Ms. Cowles received a HUD-1 Settlement Statement that disclosed on Line 1105 a \$250 document preparation charge payable to Bank West. (Second Am Compl ¶¶ 5-6 & Ex 1 thereto (HUD-1 Settlement Statement), App 57a, 76a.) The current basis for Plaintiffs' putative class action (seven previous bases have already been rejected) is the claim that Bank West should have included the document preparation charge in the loan's APR, rather than disclosing it as a separate line item, because the charge was allegedly unrelated to document preparation. (Second Am Compl ¶¶ 34-37, App 69a.)

The Purpose of the Document Preparation Charge

From 1992 to 1998 (the class period Ms. Cowles asserted in her Complaint), Bank West made thousands of mortgage loans. (Second Am Compl ¶¶ 23-24, App 60a-61a.) In connection with some of these loans, Bank West received a document preparation charge. (*Id.* ¶¶ 21-22, App 60a.) The charge ranged from \$100 to \$250 and, as disclosed to borrowers, was paid directly to Bank West. (*Id.* ¶ 21, App 60a.)

Bank West's Chief Lending Officer, James Koessel, who was at all times part of the bank's "upper management" (Koessel Dep of 10/7/98, at 99, App 54a), testified unambiguously that the document preparation charge was imposed "to defray some of the costs that [the bank] would incur in preparing all the documents related to a residential mortgage transaction except those that [the bank] could not charge for." (*Id.* at 20 (emphasis added), App 48a.) Although Bank West initially imposed a \$100 document preparation charge, it increased the charge to \$250 "to be in line with [its competition], . . . to increase [its] fee more up to

market level[, and to cover its] costs going up.” (*Id.* at 60-61, App 50a-51a.) Mr. Koessel confirmed that Bank West did “in fact provide to the borrowers the service of preparing documents in connection with closing the loan” (*id.* at 64-65, App 52a-53a), a point Plaintiffs have never disputed.

The only other witness who testified about Bank West’s document preparation charge was Paul Sydloski, Bank West’s former President. (Sydloski Dep at 7, App 83a.) When asked broadly whether the charge was intended to defray the costs of “processing and approving and making loans,” Mr. Sydloski answered: “[p]art of the costs, correct.” (*Id.* at 33 (emphasis added), App 85a.) Mr. Sydloski later confirmed that such loan costs total more than \$600 (*Id.* at 126-127, App 94a-95a),¹ and include preparation of a large number of documents, such as:

- the mortgage application (*id.* at 73, App 86a);
- refinancing statements and payoff letters (*id.* at 74, App 87a);
- credit reports and credit references (*id.* at 75, App 88a);
- an employment verification form (*id.* at 76, App 76a);
- forms for securing a property appraisal (*id.* at 77, App 90a);
- the mortgagee’s title insurance (*id.*);
- a survey or satisfactory surveyor statement (*id.* at 78, App 91a);
- the HUD-1 (*id.* at 79-80, App 92a-93a);

¹ In their response to the Application for Leave to Appeal, Plaintiffs claimed that Mr. Koessel “did not corroborate Sydloski’s testimony that his study revealed costs in excess of \$600 per loan.” (Pls’ Resp Br at 9 n 3.) The record does not substantiate this claim. Mr. Sydloski testified that total loan costs exceeded \$600. (Sydloski Dep at 126-127, App 94a-95a.) Mr. Koessel testified about a subcategory of loan costs that excluded other costs, such as occupancy expense, secondary marketing expense, and the like. (Koessel Dep of 4/1/99 at 47, App 47a.) Mr. Koessel testified that this subcategory of costs, solely for processing, closing, and underwriting (all of which include document preparation), “exceeded \$298” per loan, on average. (*Id.*)

- a TILA disclosure (*id.*); and
- a Good Faith Estimate (*id.*).

Mr. Sydloski never said (and did not know) what portion of the \$250 document preparation charge or the more than \$600 in costs was allocable to preparation of these documents. The witness who had that knowledge was Mr. Koessel, and he testified that the \$250 charge was intended to cover solely document preparation. (Koessel Dep of 10/07/98 at 20, App 48a.)

The Trial Court Dismisses Ms. Cowles' Initial TILA Claim

Ms. Cowles filed her putative class action complaint on July 1, 1998, alleging several claims related to Bank West's \$250 document preparation charge, including unauthorized practice of law, violations of the Michigan Consumer Protection Act, replevin, unjust enrichment, innocent misrepresentation, and negligent misrepresentation. *Cowles*, 263 Mich App at 217; 687 NW2d 603, App 230a. Ms. Cowles did not include a TILA claim, and such a claim would have been barred in any event because of TILA's one-year statute of limitations. 15 USC 1640(e).

On August 20, 1998, Cowles amended her complaint to allege that the document preparation fee violated TILA, 15 USC 1638, purportedly because Bank West improperly identified the charge as one "paid to others on your behalf." 263 Mich App at 217; 687 NW2d 603, App 230a. When the trial court learned that the form correctly stated that this charge was paid to the bank, and not "to others," as Plaintiffs alleged, it granted summary disposition on this TILA claim, and Plaintiffs have not appealed that ruling. *Id.*, App 230a-231a.

Ms. Cowles' Amended (and Untimely) TILA Claim

On February 16, 1999, Ms. Cowles filed a second amended complaint, alleging a completely different TILA violation. 263 Mich App at 217; 687 NW2d 603, App 231a. This time, Ms. Cowles claimed that Bank West failed to include the document preparation charge in the loan's APR, an alleged violation of 15 USC 1605(a) and Regulation Z, 12 CFR 226.4(c)(7), because the charge purportedly did not relate to document preparation. 263 Mich App at 217-218; 687 NW2d 603, App 231a. The trial court certified the class as described in the second amended complaint, and Bank West moved for reconsideration, arguing that Ms. Cowles could not represent the class on this TILA claim, because her own claim was time barred. *Id.* at 218; 687 NW2d 603, App 231a. (Ms. Cowles filed her initial Complaint on July 1, 1998, more than one year after her February 7, 1997 closing. *See* 15 USC 1640(e) (one year statute of limitations for TILA claims).) The trial court granted summary disposition to Bank West on Ms. Cowles' new TILA claim, holding the claim barred by the statute of limitations. 263 Mich App at 218; 687 NW2d 603, App 231a.

Ms. Paxson's Intervening (and Untimely) TILA Claim

After Bank West filed its motion for reconsideration, Plaintiff Karen Paxson moved to intervene and serve as the class representative for the time-barred TILA claim. 263 Mich App at 218; 687 NW2d 603, App 231a. Ms. Paxson had obtained a residential refinancing loan from Bank West on February 9, 1998, and the Bank received the same \$250 document preparation charge. *Id.* On January 10, 2000, the trial court granted summary disposition to Bank West on all of Plaintiffs' remaining claims, save Ms. Paxson's TILA claim. *Id.*

If Ms. Paxson's TILA claim is tolled from the filing of the initial class action complaint on July 1, 1998, then Ms. Paxson is within the applicable limitations period. But if

Ms. Paxson's TILA claim relates instead to the filing of the February 16, 1999 amended complaint, the date when the TILA document preparation charge claim was brought for the very first time, then Ms. Paxson's claim is time barred.

The Trial Court Holds Ms. Paxson's Claim Time Barred

Ms. Paxson and Bank West filed cross motions for summary disposition on the TILA claim, and the trial court ruled that Ms. Paxson's TILA claim was barred because it accrued more than one year before the TILA claim was pled in the second amended complaint. (1/24/00 Order ¶ D, App 226a.) In so holding, the trial court rejected Ms. Paxson's argument that her claim was tolled from the time Ms. Cowles filed the initial class complaint, a complaint that did not contain a TILA claim:

[T]he question is whether the two court rules, MCR 2.118(D) and MCR 3.501(F)(1), can be read in pari material, if you will, so as to allow the relation back rule, in a situation where here, the amended complaint by class member Paxson does not raise the Truth-In-Lending Act issue until after the one year period has run as to her, even though the original complaint raising unauthorized practice of law and unjust enrichment was filed within the one year limitation period as to her.

* * *

Under those circumstances I'm inclined to agree that some deference should be granted to the extremely narrow limitation period and the policy which undergirds it in federal law and to the strict reading of the requirement in *American Pipe & Constr Co v Utah*, 414 US 538; 94 S Ct 756 (1974)] and related cases that notification of a substantive claim requires notification of the cause of action as well as the conduct which is complained of, which is lacking in this case until after class member Paxson filed the amended complaint which was manifestly after the running of the statute of limitations.

(Trial Ct Hr'g Tr (Ruling of Court) at 16-17, App 222a-223a (emphasis added).) Ms. Paxson appealed.

The Court of Appeals' Ruling

The panel majority below began by addressing the trial court's holding that Ms. Paxson's claim was time barred. As the panel majority correctly recognized, "[n]either the Michigan Court of Appeals nor the Michigan Supreme Court has decided whether the amendment of a class action complaint to add new theories of liability relates back to the filing of the initial complaint for purposes of computing the expiration of the period of limitations." 263 Mich App at 219-220; 687 NW2d 603, App 231a. The panel majority also acknowledged "[t]here is no particular court rule or authority governing the relation back of amendments in class action lawsuits." *Id.* at 221; 687 NW2d 603, App 232a. Nevertheless, the panel majority found "no reason, nor do we find any controlling authority, that requires departure from the general rule of the relation-back doctrine when the action is a representative one and not an individual one." *Id.* at 228; 687 NW2d 603, App 234a. The panel majority thus concluded that "the relation-back doctrine applies to Paxson's TILA claim and the claim was improperly dismissed on motion for summary disposition," *id.* at 231; 687 NW2d 603, App 236a, even though Ms. Cowles did not bring, and could not have brought, that TILA claim at the time she filed her initial class action complaint.

The panel majority then turned to the merits of the TILA claim. Under 15 USC 1605(a), a lender may exclude certain charges from a loan's APR calculation. One of those items is "fees for preparation of loan-related documents." 15 USC 1605(e)(2). Regulation Z, 12 CFR 226.4(c)(7), states that fees for preparing loan-related documents such as deeds, mortgages, and reconveyance or settlement documents are properly excludable from the finance charge (i.e., excludable from the APR calculation) if they are "bona fide and reasonable" in amount. Noting that Regulation Z does not define the term "bona fide," the court used a dictionary definition:

“done in good faith, without deception or fraud, authentic, genuine, real.” 263 Mich App at 234; 687 NW2d 603, App 237a.

The panel majority then held there was a “question of material fact with respect to whether the fee was for a variety of services necessary to take the loan from application through closing and beyond.” 263 Mich App at 235; 687 NW2d 603, App 237a. This conclusion was based on a single passage that Plaintiffs plucked from the deposition of Paul Sydloski, who testified that “he believed that the document preparation fee was charged to cover or defray defendant’s expenses, specifically the costs associated ‘with taking a loan through the entire sequence from the application through the closing’ and subsequently selling it to the secondary market or keeping it.” (*Id.* at 234-235; 687 NW2d 603, App 237a (emphasis added).) But, as noted above, Mr. Sydloski clarified that the charge covered only a “[p]art” of such costs (Sydloski Dep at 33, App 85a), which totaled more than \$600 (*id.* at 127, App 95a) and included preparation and review of a number of documents (*id.* at 73-80, App 86a-93a). And Mr. Sydloski was not asked what he meant by using the term “defray.”

Mr. Sydloski also testified that the decision to begin assessing a document preparation charge was based on the recommendation of Mr. Koessel. (Sydloski Dep at 31, App 84a.) And it was Mr. Koessel who testified unequivocally that “the [document preparation] fee was being charged to defray some of the costs that [the bank] would incur in preparing all the documents related to a residential mortgage transaction except those that [the bank] could not charge for.” (Koessel Dep of 10/07/98 at 20, App 48a.) Nevertheless, the panel majority applied its subjective beliefs test and reversed the trial court’s dismissal of Plaintiffs’ TILA claim based on the isolated deposition passage Plaintiffs cited, purportedly presenting Sydloski’s beliefs. 263 Mich App at 235; 687 NW2d 603, App 237a. The panel majority did hold, however, “that there

is no question of material fact with respect to reasonableness,” because Plaintiffs “failed to offer evidence to dispute that \$250 is reasonable in west Michigan for document preparation.” *Id.*

Judge O’Connell wrote a forceful dissent. He agreed with the trial court that the claims of both Ms. Cowles and Ms. Paxson were barred by the applicable statute of limitations, 263 Mich App at 236; 687 NW2d 603, App 238a, and further concluded that a \$250 document preparation fee was “bona fide and reasonable,” as the United States Court of Appeals for the Sixth Circuit had held in *Brannam v Huntington Mortgage Co*, 287 F3d 601, 606 (CA 6, 2002). 263 Mich App at 236-237 & n 1; 687 NW2d 603, App 238a. Accordingly, “remand would only further waste the state’s limited judicial resources.” *Id.* at 237; 687 NW2d 603, App 238a.

Judge O’Connell’s rejection of the majority’s novel class action tolling theory is particularly instructive:

Because I would hold that the filing of Cowles’ original, legally infirm complaint does not toll the statute of limitations, both Paxson and Cowles should be barred from representing the class and we should affirm the trial court’s dismissal.

The majority opinion goes astray when it fails to acknowledge that neither the TILA claim nor the original claim of illegal practice of law ever had a legitimate basis in the law. Deciding to disregard this detail, the majority allows Paxson to litigate the stale TILA claim as though the legal fiction of class status can somehow resurrect it. Propping up its legal reasoning on the erroneously granted class status, the majority allows Paxson to emerge from anonymity, replace Cowles as class representative, and advance a new cause of action that Cowles could not legitimately assert herself. The majority permits the substitution of claims and parties by glossing over Paxson’s own failure to file within the time restraints of the statute of limitations. Stretching the legal fiction of class status far beyond its rending point, the majority holds that the previously unknown Paxson, as a silent member of the ill-founded class, had actually asserted the new claim from the time of the original complaint. If the majority correctly deemed Paxson a new party, the new claim would fail for tardiness.

The majority’s contrary holding has more insidious ramifications than hyper-extending the statute of limitations on one claim for one group of litigants. It permits class litigants to ignore completely statutes of limitations as long as they can continue to muster fresh “class” plaintiffs with plausible causes of action stemming from the same general circumstances alleged in the complaint. If a

court finds that one claim lacks legal support, the class's attorneys may simply conjure another legal issue, amend the complaint to include it, and avoid the running of any period of limitations by relating the claim back to their original, defeated complaint. If the representative did not suffer the new harm alleged or is legally barred from asserting it, the class may simply conjure one of its imaginary participants and put him at the class's helm. This approach allows a massive suit, brimming with countless phantom plaintiffs, to rise repeatedly from its own ashes like a litigious Phoenix until a vexed and exhausted defendant finally pays it enough money to haunt somewhere else.

I would simply hold that the trial court clearly erred when it certified this class, so dismissal was proper. As a preemptive measure, I would also hold that certification of a class only tolls the statute of limitations for claims that originally and properly received certification. Any new claims would need separate class certification and would not benefit from the tolling rules until the trial court separately certified them as worthy of class status, including the eligibility of the representative. This holding would not contradict MCR 3.501(F) and would prevent the farcical promotion of dormant parties for the sole purpose of circumventing traditional relation-back and tolling principles. Because the majority's result enables litigants to abuse class action procedures and the present claim is ultimately doomed on its merits, I would affirm the decision of the trial court.

263 Mich App at 238-240; 687 NW2d 603, App 238a-239a (emphasis added, citations omitted).

The Court of Appeals denied Bank West's motion for reconsideration, again with Judge O'Connell dissenting. This Court granted Bank West's Application for Leave to Appeal on October 19, 2005.

STANDARD OF REVIEW

This Court reviews *de novo* a decision to grant or deny summary disposition. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004) (citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999)). In interpreting federal statutes and regulations, this Court looks to authoritative decisions of the federal courts. *Bement v Grand Rapids & I Ry Co*, 194 Mich 64, 65-66; 160 NW 424 (1916). Where the United States Supreme Court has not rendered an opinion on a particular issue, this Court will use decisions of the lower federal courts if their analyses and conclusions are persuasive and appropriate for Michigan jurisprudence. *Abela v Gen'l Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

ARGUMENT

I. Class Action Tolling Should Not Extend to a Claim That Was Not, and Could Not Have Been, Asserted by a Class Representative.

This Court has long noted the importance of limitation periods to protect potential defendants from “protracted fear of litigation.” *See, e.g., Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974) (citation omitted).² Nowhere is that principle more important than in the class action context, where a plaintiff class should not be permitted to artificially extend class claims “until a vexed and exhausted defendant finally pays.” *Cowles*, 263 Mich App at 240; 687 NW2d 603, App 239a (O’Connell, J, dissenting). Yet, as Judge O’Connell recognized in dissent,

² *Accord Order of RR Telegraphers v Railway Express Agency*, 321 US 342, 348-349 (1944) (“Statutes of limitation . . . promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation”) (quotation omitted). Because limitations statutes afford plaintiffs only a reasonable period in which to bring suit, they encourage plaintiffs to pursue their claims diligently. *NLRB v California Sch of Prof'l Psychology*, 583 F2d 1099, 1101 (CA 9, 1978). The courts also benefit from these laws; they are spared the burden of adjudicating stale claims, and their credibility is enhanced by improving the accuracy of fact-finding. *United States v Kubrick*, 444 US 111, 117 (1979).

the Court of Appeals here has effectively abolished the federal and state legislative policy choices that are embodied in statutes of limitations as applied in class action proceedings. This Court should hold that the class action tolling doctrine is inapplicable to the circumstances presented here, and that Ms. Paxson's TILA claim is time barred.

- A. The class action tolling doctrine was designed to encourage a class member to rely on the claims asserted by her class representatives, rather than filing a separate lawsuit, but only if the class member's own claims are identical to those of the representatives.**

MCR 3.501(F) provides that "the statute of limitations is tolled as to all persons within the class described in the complaint on the commencement of an action asserting a class action." This rule codifies the holding of *American Pipe & Construction Co v Utah*, 414 US 538 (1974), the seminal United States Supreme Court decision concerning statute of limitations tolling for class action lawsuits. See Committee Comments to 1983 revision of former GCR 1963, 208.6; Martin Dean & Webster, *Michigan Court Rules Practice*, MCR 3.501 at 29.

In *American Pipe*, the State of Utah filed a federal antitrust class action on behalf of itself and a class of other public bodies and agencies 11 days before the statute of limitations expired. Within eight days of the trial court's denial of the class certification motions, several putative class members filed motions to intervene. The district court denied leave to intervene based on the statute of limitations. The Supreme Court held that the intervenors were not barred by the statute limitations, because "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 US at 553. The Court explained that class actions are designed to "avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 US at 550. Moreover:

[t]he policies of ensuring essential fairness to defendants and of barring a plaintiff who has slept on his rights, are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.

414 US at 554-555 (citations omitted, emphasis added).

Nine years later, in *Crown, Cork & Seal Co v Parker*, 462 US 345 (1983), the United States Supreme Court extended the tolling of the statute of limitations to those bringing individual actions after class certification is denied, and to those electing to opt out of the class action to file individual claims. In so ruling, the Court reiterated that the doctrine is designed to encourage class members to rely on named plaintiffs to pursue class claims, instead of filing repetitious individual claims. *Crown, Cork*, 462 US at 350, 352-353. But the Court cautioned that “[t]he tolling rule of *American Pipe* is a generous one, inviting abuse[.]” and it “should not be read . . . as leaving a plaintiff free to raise different or peripheral claims following denial of class status.” 462 US at 354 (Powell, J, concurring).

Critical to the analysis here, the Supreme Court later clarified that the class action tolling doctrine is limited to putative class members who seek to pursue precisely the same cause of action as did the class representatives. In *Johnson v Ry Express Agency, Inc*, 421 US 454 (1975), for example, the Court rejected the argument (in a non-class context) that the timely filing of a charge of employment discrimination with the EEOC under Title VII tolled the limitations period applicable to an action based on the same facts under 42 USC 1981. In so holding, the Court expressly stated that “the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* [*v New York Central R Co*, 380 US 424 (1965)] depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted.”

421 US at 467 (emphasis added). As a result, potential tolling protections exist “[o]nly where there is complete identity of the causes of action.” *Id.* at 467 n 14. *Accord Int’l Union of Elec Radio & Mach Workers*, 429 US 229, 238 n 11 (1976) (reaffirming *Johnson*); *accord Cowles*, 263 Mich App at 239 n 2; 687 NW2d 603, App 239a (O’Connell, J, dissenting) (“It bears noting that the trial court could have disposed of this case solely on the grounds that the original illegitimate complaint never provided notice of possibility that the new claim, based on totally different legal grounds, might later arise.”) (citing *American Pipe*, 414 US at 554-555).

Keeping in mind this crucial prerequisite for the class action tolling doctrine to apply, it is appropriate to consider Ms. Paxson’s request that she be permitted to use Ms. Cowles’ initial complaint to toll her TILA claim against Bank West, when Ms. Cowles did not assert, and could not have asserted, a TILA claim of her own in that complaint.

B. The policies embodied in the class action tolling doctrine do not support an extension of that doctrine to claims that were not, and could not have been, brought by the class representatives.

As the panel majority below correctly observed, “[t]here is no particular court rule or authority governing the relation back of amendments in class action lawsuits.” 263 Mich App at 221; 687 NW2d 603, App 232a. The question for this Court, then, is whether the class action tolling doctrine should be extended to situations like those here, where a plaintiff attempts to intervene to pursue a new claim that was not, nor could have been, brought by the class representatives. This Court should answer that question “no.”

Here, Ms. Paxson could not have been relying on Ms. Cowles to protect and assert her TILA claim, because Ms. Cowles did not bring, and could not have brought, a timely TILA claim. *Cowles*, 263 Mich App at 238-239; 687 NW2d 603, App 239a (O’Connell, J, dissenting) (“Propping up its legal reasoning on the erroneously granted class status, the majority

allows Paxson to emerge from anonymity, replace Cowles as class representative, and advance a new cause of action that Cowles could not legitimately assert herself.”). In this situation, there is no policy of efficiency or economy that militates against the filing of a second lawsuit, or against the filing of a motion to intervene in the first suit. In fact, just the opposite is true; judicial efficiency and economy dictate that the excluded TILA claim be brought immediately, rather than years after the fact.

Thus, a potential class member like Ms. Paxson, who was or should have been aware that Ms. Cowles had not pled a TILA claim, sleeps on her rights by failing to bring a second action or moving to intervene immediately. To hold otherwise would prejudice Bank West by allowing Ms. Paxson to assert claims of which Bank West did not have timely notice. *See Southwire Co v JP Morgan Chase & Co*, 307 F Supp 2d 1046, 1062-1063 (WD Wis, 2004) (rejecting plaintiffs’ attempt to bring late-filed federal antitrust claim based on purported tolling effect of prior class action filing that included a state antitrust claim on the same facts; “to claim a tolling benefit from a previous class action, the legal theory on which the class action plaintiffs sued must be the same theory used by the plaintiffs claiming the tolling benefit”). A contrary ruling would also contravene the Supreme Court’s statement that tolling depends on “exactly the same cause of action” being asserted. *Johnson*, 421 US at 467.

Numerous courts have similarly limited the doctrine, particularly in light of the Supreme Court’s caution that class action tolling “must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights.” *American Pipe*, 414 US at 561 (Blackmun, J, concurring). In *Weston v Ameribank*, 265 F3d 366 (CA 6, 2001), for example, plaintiff borrowers, members of a state court class action against the lender that had

been dismissed, brought a second class action complaint to make the TILA allegations, attempting to rely on the prior class action to toll the statute of limitations for the claim. The Sixth Circuit affirmed the trial court's dismissal of the action on limitations grounds, analyzing the claim precisely as the Court of Appeals should have done here:

The *Dressel* case did not toll the TILA's one-year statute of limitations for Weston's TILA claim because the Dressels did not assert a TILA claim and the Dressels could not have made a TILA claim in their initial complaint because their complaint was filed after the TILA's one-year statute of limitations had run.

265 F3d at 369 (emphasis added).

Other courts have held even more strictly that it is inappropriate to apply *American Pipe* class tolling to a claim that the purported class representative had no standing to assert in the first place. See, e.g., *Hess v IRE Real Estate Income Fund, Ltd*, 629 NE2d 520, 533-534 (Ill Ct App, 1993) (limitation period not tolled during class action as to defendants whom class plaintiff had no standing to sue); *Cunningham v Insurance Co of North America*, 530 A2d 407, 408 (Pa, 1987) ("providing notice of the mere possibility of an actionable claim, by filing a non-justiciable class action suit, cannot be regarded as sufficient to toll the statute of limitations"); *In re Colonial Ltd P'ship Litig*, 854 F Supp 64, 82 (D Conn, 1994) ("if the original plaintiffs lacked standing to bring their claims in the first place, the filing of the class action complaint does not toll the statute of limitations for other members of the purported class"); *Elscint Ltd Sec Litig*, 674 F Supp 374, 378-379 (D Mass, 1987) ("it would be improper to allow the filing of a class action by nominal plaintiffs who are wholly inadequate to represent the asserted class to have the effect of tolling limitation to permit the otherwise untimely intervention of a proper class representative.").

Still other courts have held that *American Pipe* does not allow plaintiffs to “piggyback” class action claims. Here, Ms. Paxson attempted to assert a TILA claim on behalf of the class, rather than an individual claim on her behalf only. But “the courts of appeals that have dealt with [this] issue appear to be in unanimous agreement that the pendency of a previously filed class action does not toll the limitations period for additional class actions by the putative members of the original asserted class action.” *Andrews v Orr*, 851 F2d 146, 149 (CA 6, 1988), citing *Korwek v Hunt*, 827 F2d 874, 879 (CA 2, 1987); *Salazar-Calderon v Presidio Valley Farmers Ass’n*, 756 F2d 1334, 1351 (CA 5, 1985); *Robbin v Fluor Corp*, 835 F2d 213, 214 (CA 9, 1987); *Korwek*, 827 F2d at 878 (“Putative class members may not piggyback one class action into another and thus toll the statute of limitations indefinitely.”).³

This Court should follow the reasoning in these cases and deny Ms. Paxson the opportunity to extend artificially the length of her one-year limitations period. As Judge O’Connell stated below, such a holding “would not contradict MCR 3.501(F) and would prevent the farcical promotion of dormant parties for the sole purpose of circumventing traditional relation-back and tolling principles.” 263 Mich App at 240; 687 NW2d 603, App 239a (O’Connell, J, dissenting).

³ It is irrelevant that Ms. Paxson intervened as a plaintiff and attempted to assert class claims, rather than having filed a separate suit. *Fleming v Bank of Boston Corp*, 127 FRD 30, 36-37 (D Mass, 1989) (“[The proposed intervenor] apparently recognizes that the foregoing case suggest that a new action alleging claims of the putative class would be barred by the statute of limitations. The motions to intervene, therefore, are evidence efforts to circumvent this bar. . . . [But] if intervention were now allowed, not only would the original plaintiff . . . not be able to serve as a class representative, he would not even be a member of the putative class. Thus, to allow [the proposed intervenor’s] motions to intervene would be to sanction and encourage abuse of the class action provisions of federal law.”).

C. The Court of Appeals erred when it allowed Ms. Paxson to take advantage of the class action tolling doctrine when a TILA claim was not, and could not have been, asserted in Ms. Cowles' initial complaint.

In permitting Ms. Paxson to proceed with her time-barred claim, the panel majority below relied on the relation-back principle that applies to non-class action disputes, MCR 2.118(D). This reliance was misplaced for a number of reasons.

First, the “relation back” argument is completely inconsistent with the holding in *American Pipe*. Indeed, if the panel majority below was correct, and the relation-back principle applied in a class context to proposed intervenors, the Supreme Court’s holding in *American Pipe* would have been entirely superfluous:

The Court would not need to create a tolling principle if the intervenor’s complaint simply related back to the filing of the original complaint. The Court held that, since the original plaintiffs filed eleven days prior to the expiration of the limitations period, the intervenors had eleven days from the denial of the class certification motion to file their motions to intervene. Thus, the *American Pipe* decision implicitly rejects the notion that statutes of limitation are not an appropriate consideration on a motion to intervene.

Flower Cab Co v Petite, 1987 WL 14715, at *6 (ND Ill, July 21, 1987) (emphasis added).⁴ In other words, the very case that MCR 3.501(F) codifies, *American Pipe*, makes clear that the relation-back principle is inapplicable here, because if the principle was available to class members, there would be no need for a tolling doctrine at all. Every intervening plaintiff seeking to pursue a new claim would simply “relate back” the claim to the initial complaint.

⁴ The plain language of MCR 2.118(D) does not purport to apply to the class action tolling doctrine contained in MCR 3.501(F)(1). Since an interpretation that results in the fusion of these two otherwise unrelated rules results in derogation of the common law rule articulated in *American Pipe* and *Johnson*, 421 US at 467 (class action tolling requires that the initial complaint articulate “exactly the same cause of action subsequently asserted”), this Court should reject that construction. See generally *Mehelas v Wayne Co Cmty College*, 176 Mich App 809,

Accordingly, the sole legal basis for the panel majority's ruling is inconsistent with the class action tolling doctrine the majority below invokes.

Second, the Court of Appeals failed to recognize the central importance of the claims asserted by the class representative when it allowed Ms. Paxson's TILA complaint to "relate back" to the date Ms. Cowles filed the original complaint, when Ms. Cowles did not, and could not, claim a TILA violation. Class action trials are trials by proxy. The claims of the class representative are tried and a verdict rendered, and that verdict is applied to all class members. Because this is the nature of a class action, i.e., that the results of one trial are applied automatically to hundreds or even thousands of class plaintiffs, it is a matter of both fundamental fairness and court rule that the claims of the representative party be "typical" of claims of the class. MCR 3.501(A)(1)(c). Certification of a class is thus always in the context of the asserted claims, and the class is certified only for trial of common claims possessed by the class representative. There are many cases in which only some of the representatives' claims are certified for trial, and others are left for class members to pursue individually.

The results of a class action trial are binding on all persons who do not "opt out," 3.501(D)(5), but only on the claims they share with the class representative. The results do not have a preclusive effect on claims that the class representative did not assert. *See, e.g., Cooper v Fed Reserve Bank of Richmond*, 467 US 867, 880 (1984) (class action determination that there was no pattern or practice of discrimination was dispositive of class member claims in that regard, but not dispositive of individual claims of discrimination as alleged in class members' subsequent individual suits). Accordingly, if a class plaintiff has a claim that the class representative does not assert, she knows that claim will not be tried, and it is up to that class

814; 440 NW2d 117 (1989) ("statutes and court rules in derogation of the common law must be

member to timely file an action on that claim. The Court of Appeals' ruling gives unasserted claims the same standing and importance as asserted claims, unintentionally turning the underlying principles of class action practice on their head.

Third, any construction of the Michigan Court Rules must be consistent with the purpose of the Rules. *Meece v Meece*, 223 Mich App 344, 346-347; 566 NW2d 310 (1997) (court rule should be construed "in light of the purpose to be accomplished") (citing *Smith v Henry Ford Hosp*, 219 Mich App 555; 557 NW2d 154 (1996)). And one of the primary purposes of the Rules is "to secure the just, speedy, and economical determination of every action." MCR 1.105.⁵ Certainly that is the purpose of the class action tolling rule, MCR 3.501(F), which is generally intended to encourage the efficient and expeditious litigation of class claims. *American Pipe*, 414 US at 550 (tolling rule is to "avoid, rather than encourage, unnecessary filing of repetitious papers and motions"). But a construction of the rules that permits the tolling of claims that were not, and could not have been, asserted by the class representatives is anything but efficient and expeditious.

Consider the following hypothetical. Ms. Cowles files her initial complaint based solely on the unauthorized practice of law claim, which has a six-year limitations period, MCL 600.5813. Ms. Cowles files the complaint on the last day of the limitations period, and the parties litigate for one year before the trial court is ready to dismiss it. Seven years after the underlying "transaction," a previously unidentified class member steps forward to intervene on behalf of herself and the class to "relate back" a Michigan Consumer Protection Act claim that Ms. Cowles cannot assert. The parties litigate the MCPA issue another year to near conclusion

strictly construed.").

when unidentified class member number two steps forward to intervene on behalf of herself and the class to “relate back” a replevin claim that neither Ms. Cowles nor unidentified class member number one can assert. This pattern continues for the unjust enrichment, innocent misrepresentation, negligent misrepresentation, and initial TILA claim, finally concluding with the TILA claim that Ms. Paxson is now currently asserting. Some 13 years after the underlying transaction, Bank West has notice for the very first time that it is being sued for a TILA claim that is ordinarily barred by a one-year statute of limitations. 15 USC 1640(e). This is an absurd result, particularly in light of TILA’s modest one-year limitations period. (Trial Ct Hr’g Tr (Argument) at 31, App 161a (“A year. That’s why it’s a pretty tight statute.”). Yet, such a result naturally flows from the panel majority’s tolling rule.⁶

Fourth, the panel majority below asserted that if “class members cannot rely on the named plaintiff to toll the period of limitations on their claims, each class member will be required to separately bring all claims in his own name on the chance that the representative plaintiff will later be found to have an invalid claim and that the benefit of tolling will not apply.” 263 Mich App at 228; 687 NW2d 603, App 235a. But this dispute does not involve Ms. Paxson’s reliance on a claim that Ms. Cowles initially asserted and that a court later held invalid; rather it involves Ms. Paxson’s “reliance” on a claim that Ms. Cowles never asserted (nor could

⁵ Although the Rules are also to be constructed so as not to “affect the substantial rights of the parties,” MCR 1.105, this principle is not at issue here, where the failure of Ms. Paxson’s claim results from her own decision not to bring the claim within the applicable limitations period.

⁶ *Accord Cowles*, 263 Mich App at 240 n 4; 687 NW2d 603, App 239a (O’Connell, J, dissenting) (“an example well within the extreme would be a pharmaceutical case where a newborn was made a member of the class. Hypothetically, the majority opinion would allow the class to wait a year after the child turns eighteen to amend its complaint and add a completely new cause of action. MCL 600.5851(1). The delay could then perpetuate itself if the class remained open ended and new infants fell within the class description at the time of amendment. Fictions fails when they fail to assist justice. Delays cause real harm to litigants and, if encouraged, erode the integrity of the judicial system.”).

she) at all. The panel majority erred in reasoning that allowing Ms. Paxson to intervene “affected the class action only by adding a named plaintiff to prosecute the properly added TILA claim,” 263 Mich App at 231; 687 NW2d 603, App 235a, because the TILA claim was not properly added with respect to Ms. Cowles, whose own TILA claim was already barred by the limitations period at the time she filed her initial complaint. *Accord Cowles*, 263 Mich App at 238; 687 NW2d 603, App 238a-239a (O’Connell, J, dissenting) (“The majority opinion goes astray when it fails to acknowledge that neither the TILA claim nor the original claim of illegal practice of law ever had a legitimate basis in the law. Deciding to disregard this detail, the majority allows Paxson to litigate the stale TILA claim as though the legal fiction of class status can somehow resurrect it.”).

In this respect, the present dispute is nothing like the one in *Haas v Pittsburgh Nat’l Bank*, 526 F2d 1083 (CA 3, 1975), a case on which the panel majority relied below. *Cowles*, 263 Mich App at 231; 687 NW2d 603, App 235a. In *Haas*, the amended complaint sought merely to substitute an additional plaintiff on an existing claim for which the class representative lacked standing. 526 F2d at 1095-1096. The amendment did not seek to add any new legal claims or theories. The situation in *Haas* stands in stark contrast to Ms. Paxson’s belated attempt here to add a brand new TILA claim that was not, and could not have been, asserted by Ms. Cowles at the time Ms. Cowles filed her initial complaint.

Finally, the panel majority below attempted to cabin the extraordinary breadth of its holding by pointing to the judicial discretion that MCR 2.118(A)(2) grants a trial court when it considers a proposed amendment to a complaint. The majority asserts that “Plaintiffs in class action lawsuits will not have unfettered discretion to keep amending the complaint until they find a cause of action on which they can prevail.” 263 Mich App at 227-228 n 1; 687 NW2d 603,

App 234a. But MCR 2.118(A)(2) states that a plaintiff's request to amend a complaint should be "freely given," rendering illusory the majority's sole purported limitation. Furthermore, the majority replaces the certainty of a statute of limitations with a ruling based on discretion. The time a party has to file a lawsuit is not "discretionary" in any other context, and should not be "discretionary" in a class context.

The practical effect of the Court of Appeals' expansion of the class action tolling doctrine is to bless putative class action claims with a lifespan that far exceeds the usual limitations period. Such an outcome defeats business plans and expectations, and it ultimately could have a chilling effect on future business investment in Michigan, at a time when such investment is sorely needed. It makes far more sense for a business to locate in a nearby state, where the business will have the benefit of a known, legislatively approved limitations period, than to locate in Michigan and potentially open itself to class actions virtually unconstrained by state or federal statutes of limitations. The Court of Appeals' decision should be reversed.

II. A Document Preparation Charge is "Bona Fide" If the Services For Which the Charge Was Received Were Actually Performed.

A. This Court should use an objective test for determining whether a charge was "bona fide" for purposes of TILA.

When interpreting federal statutes and regulations, this Court looks to authoritative decisions of the federal courts. *Bement v Grand Rapids & I Ry Co*, 194 Mich 64, 65-66; 160 NW 424 (1916). Here, this Court should look to *Guise v BWM Mortgage, LLC*, 377 F3d 795, 800 (CA 7, 2004), a Seventh Circuit decision issued one day before the Court of Appeals' decision below. In *Guise*, the plaintiffs similarly claimed that defendants violated TILA in connection with a home mortgage, alleging that the fees they paid for title insurance and endorsements exceeded a quote for the same services by a rival title insurance provider. Regulation Z

provides that such charges, like the document preparation charge at issue here, need not be included when computing the APR “if the fees are bona fide and reasonable.” 12 CFR 226.4(c)(7)(i) (emphasis added).

Like the purported class representatives here, the *Guise* plaintiffs argued that “only a jury could determine if the charges were bona fide as a matter of law,” 377 F3d at 800, but the Seventh Circuit disagreed, applying an objective “were the services performed?” test:

The plaintiffs did not allege in their complaint or proposed amended complaint that they did not receive title insurance and endorsements from Clearwater, nor did the complaint allege any facts to give rise to the inference that Clearwater failed to perform those services. The district court had no reason to conclude that the transaction was anything but bona fide. *See Brannam v. Huntington Mortgage Co.*, 287 F.3d 601, 606 (6th Cir. 2002) (stating that a charge is bona fide if the “services for which the fees are imposed are performed”).⁷

Id. (emphasis added). Since the underlying title services had actually been performed as promised, the Seventh Circuit affirmed dismissal of the plaintiffs’ TILA claim. *Accord Young v 1st American Fin Servs*, 992 F Supp 440, 443 (D DC, 1998) (title search charge was properly excluded from calculation of finance charge, even though no defense witness could identify in deposition testimony precisely what services were performed; the “inability of two deponents to identify the charge does not create a genuine issue of material fact as to whether the work was done”) (emphasis added); *Janes v First Fed Sav & Loan Assoc*, 312 NE2d 605 (Ill, 1974) (“The question of *bona fide* is obviously closely related to the question whether the discounts were properly retained as compensation for services actually performed.”) (underlined emphasis added).

⁷ Plaintiffs’ counsel in the present case was also counsel in *Brannam* and similarly characterized the Sixth Circuit’s holding. (See Pet for Cert at 20, App 250a (“The Sixth Circuit affirmed the district court’s determination that a fee for ‘document preparation’ is ‘bona fide’ so long as documents are prepared.”) (emphasis added).)

The Seventh Circuit's objective standard in *Guise* is consistent with a proper construction of the regulation. Under well-accepted canons of statutory construction, the terms "bona fide" and "reasonable" in Regulation Z must both be given meaning. See *Waltz v Wyse*, 469 Mich 642, 665; 677 NW2d 813 (2004) (it is a "maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning."). But under the subjective belief test articulated by the panel majority below, the term "bona fide" is written out of the regulation completely.

For example, assume the deposition testimony below had been that of the \$250 document preparation charge, \$200 was charged "to cover" a lender's costs of document preparation, and \$50 was for administrative overhead. The Court of Appeals has already concluded (correctly) that the \$250 charge was "reasonable" in the relevant market for document preparation. *Cowles*, 263 Mich App at 235; 687 NW2d 603, App 237a. If a jury is allowed to find that the charge was not "bona fide" because one or more of the lender's officers thought that the charge also "covered" overhead, then the bona fide test is being used as a proxy to determine whether a fee is reasonable in relation to actual cost. But cost as a measure of a fee's reasonableness is a standard the Sixth Circuit expressly rebuffed in *Brannam*, 287 F3d at 606 (rejecting plaintiffs' assertion that "mortgage lenders may only charge as a document preparation fee the amount of the lender's actual costs for preparing loan related documents"). In other words, Plaintiffs' argument that document preparation did not "cost" \$250 is wholly inconsistent with the Court of Appeals' reasonableness holding, an issue on which Plaintiffs presented no contrary evidence. *Cowles*, 263 Mich App at 235; 687 NW2d 603, App 237a.⁸

⁸ The argument is also contrary to Plaintiffs' counsel's characterization of the *Brannam* holding in the *Brannam* petition for certiorari. (See Pet for Cert at 20, App 250a ("The Sixth Circuit

To have any independent meaning, then, the term “bona fide” cannot be measured by examining whether a lender’s employee thinks that a document preparation charge exceeds the actual cost of document preparation. The reasonableness requirement must be measured by comparing the charge to the relevant market, and the bona fide requirement must be measured by comparing what was promised and what was performed before the transaction closed. It does not matter whether the document preparation charge margin (\$50 in the hypothetical) was subjectively intended to cover profit, loan processing, or doughnuts for the office staff, because document preparation services were actually provided and \$250 is reasonable in the market for this service.

In apparent recognition of these principles and in reliance on a similar case in the Sixth Circuit, Judge O’Connell dissented from the panel majority’s opinion on this issue as well. As Judge O’Connell explained:

[T]he Sixth Circuit Court of Appeals recently held that this same fee was a “bona fide and reasonable” document preparation charge under 15 USC 1605(e)(2) and 12 CFR 226.4(c)(7), so the bank need not include it in its computation of the finance charge. *Brannam [v Huntington Mortgage Co, 2987 F 2d 601 (CA 6, 2002).]* Therefore, even assuming that the period of limitations had not run on Cowles’s complaint, the TILA claim lacks sufficient legal merit to withstand summary disposition.

263 Mich App at 236 n 1; 687 NW2d 603, App 238a (O’Connell, J, dissenting) (emphasis added).⁹ Judge O’Connell’s conclusion is correct, and this Court should adopt it.

affirmed the district court’s determination that a fee for ‘document preparation’ is ‘bona fide’ so long as documents are prepared.”) (emphasis added.).

⁹ *Accord* Plaintiffs’ Pet for Cert at 20, App 250a (“The Sixth Circuit affirmed the district court’s determination that a fee for ‘document preparation’ is ‘bona fide’ so long as documents are prepared.”) (emphasis added.).

B. The subjective belief test for determining whether a document preparation charge is “bona fide” is inconsistent with TILA’s purpose and is an unworkable and nonsensical standard.

Any interpretation of the term “bona fide” in Regulation Z should be consistent with TILA’s purpose, which is to create a workable disclosure system that allows consumers to accurately compare loan terms. *See generally Household Credit Servs, Inc v Pfennig*, 124 S Ct 1741, 1749 (2004) (rejecting Regulation Z interpretation that “would prove unworkable to creditors and . . . lead to significant confusion for consumers.”). The panel majority’s subjective belief test for determining whether a fee is “bona fide” does not promote that purpose. Rather, it creates results that are contrary to that purpose.

The panel majority held that a fact question is created as to whether a document preparation charge is bona fide if an officer of the lender testifies that he thought the charge was not exclusively “for” the lender’s services in preparing loan documents, even if the amount of the charge is reasonable. *See* 263 Mich App at 615; 687 NW2d 603, App 237a (Mr. Sydloski “testified that he believed that the document preparation fee was charged to cover or defray defendant’s expenses, specifically the costs associated with ‘taking a loan through the entire sequence from the application through the closing’”). Thus, if an officer expresses his belief that a portion of the charge was “for” something other than the lender’s actual costs of preparing the loan documents, then the charge must be included in the APR. Conversely, if all of the lender’s officers say nothing on the point, or express their belief that the charge was exclusively “for” document preparation, then the fee may be excluded from the APR.

The panel majority’s subjective belief test does not allow consumers to accurately compare loan terms, a result that can be easily appreciated by comparing the present case with the Sixth Circuit’s decision in *Brannam*. Both Huntington (the bank defendant in *Brannam*) and

Bank West charged the exact same \$250 for document preparation. Both prepared the same documents. Under *Brannam*, Huntington can exclude the \$250 charge when computing its APR, but, under the Court of Appeals' ruling below, Bank West may have to include the charge when computing its APR because Plaintiffs' counsel can point to a single, out-of-context deposition passage that suggests one Bank West officer subjectively believed the charge might also cover non-document preparation expense. Assuming all other costs are equal, Huntington's APR will appear lower, even though all charges are identical. Such a result undermines TILA's purpose, which is to allow consumers to accurately compare loan terms. Moreover, Huntington's competitive advantage apparently continues forever, because Bank West's document preparation charge is irreparably "tainted" by one officer's purported subjective belief about what the fee was "for." This result is inconsistent with TILA.

Moreover, under the subjective belief test, it is now necessary in every such transaction to take post-closing depositions of the lender's officers to determine what expenses the officers thought were covered by the charge. And, as demonstrated here, questions of fact can be found on the slimmest of ambiguities contained in scores of deposition pages. The magnitude of potential new court filings is enormous, and the rush to the courthouse has already begun, evidenced by a motion Plaintiffs' counsel filed to reopen a closed case in the Kent County Circuit Court based solely on the Court of Appeals' Opinion. (Br in Supp of Mot to Reinstate Certified Class Action Claims in Light of Higher Ct of Appeals Decision, App 240a.)

Plaintiffs in this case have never alleged that Bank West failed to prepare the documents that were the subject of the \$250 document preparation fee. Instead, Plaintiffs allege only that the amount charged and disclosed for document preparation was too high and that the

high charges were a scam to cover other Bank expenses. By applying a subjective belief test, the Court of Appeals opens a Pandora's Box of litigation, in which the only certainty is confusion.

For example, what is a fact finder supposed to do with conflicting subjective beliefs? Where a lender's Chief Lending Officer believes a document preparation charge was solely for document preparation expenses, and the lender's President purportedly believes a portion of the charge was actually to cover other, non-document preparation expenses, whose subjective opinion controls, the President's, because he is more senior, or the Chief Lending Officer's, because he has more knowledge about the institution's loan practices? Should other loan officers also be polled for their subjective beliefs? What about non-officers involved in the loan transaction? Should the outcome depend on a vote of all the lender's employees who are regularly involved in home mortgage loans, with each vote carrying different weight based on seniority and experience? Such questions may sound flippant, but they must be answered if a subjective belief test is to be used when determining whether a charge is bona fide. And Plaintiffs' ability to manufacture a material question of fact here based on the out-of-context Sydloski deposition testimony demonstrates how easy it will be for any plaintiff to take a claim to trial under the subjective belief test.

The greater context of these transactions must also be considered. This is not a situation where a lender defrauded borrowers or charged for services not rendered. Plaintiffs claim only that the \$250 document preparation charge should have been included in the APR computation, rather than being listed on a separate disclosure line. Either way, the lender has to prepare the documents, and the borrower has to pay the charge. Yet under the subjective belief test, lender A and lender B will be treated differently for TILA purposes based solely on what their officers allegedly thought the charge "covered." Such a result bespeaks arbitrariness, and it

can be avoided by properly reading Regulation Z's bona fide requirement as an objective test of authenticity, just as the Seventh Circuit did in *Guise*.

C. Even under the subjective belief test, the TILA claim should be dismissed.

The panel majority concluded that a question of fact was presented regarding whether the document preparation charge was actually for a “variety of services necessary to take the loan from application through closing and beyond,” rather than solely for document preparation. 263 Mich App at 235; 687 NW2d 603, App 237a. As noted above, the panel majority reached this conclusion based on Mr. Sydloski's testimony that he “believed” the charge defrayed costs associated “with taking a loan through the entire sequence from the application through the closing.” *Id.* at 234-235; 687 NW2d 603, App 237a.

But as also noted, Mr. Sydloski went on to clarify that the charge covered only a “[p]art” of such costs, which totaled more than \$600 and included preparation and review of a number of documents. (Sydloski Dep at 33, 73-79, 127, App 85a, 86a-92a, 95a.) And Mr. Koessel, the only witness with firsthand knowledge of the charge's purpose, testified unequivocally that the charge was imposed “to defray some of the costs that [Bank West] would incur in preparing all the documents related to a residential mortgage transaction except those that [the bank] could not charge for.” (Koessel Dep of 10/07/98 at 20 (emphasis added), App 48a .) Thus, summary disposition in Bank West's favor is appropriate even under the subjective beliefs test that the panel majority articulated below.

CONCLUSION

The Court of Appeals has expanded dramatically the power of class action lawsuits in Michigan. Under the court's published decision, statutes of limitations are all but eliminated in the class context, as Judge O'Connell explained in dissent. This change impacts both

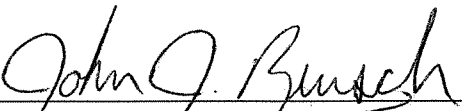
plaintiffs and defendants in scores of pending and future cases in the Michigan court system, yet does so in the absence of an express court rule or legislative amendment. This Court should reverse and reinstate the trial court's grant of summary disposition in favor of Bank West.

The Court of Appeals also misinterprets TILA, which is designed to avoid the "evil" of an apples-to-oranges comparison when a consumer examines two competing lending offers. The subjective belief test that the Court of Appeals has adopted for this State does not avoid that evil, but furthers it, making it more difficult for Michigan consumers to compare competing loan terms. On this issue, this Court should use instead the objective "were services performed?" test articulated by the Seventh Circuit Court of Appeals. Again, summary disposition in Bank West's favor is appropriate.

Alternatively, Bank West respectfully requests that this Court peremptorily reverse and adopt the dissenting opinion below of Judge O'Connell, which correctly analyzes both of these important issues.

Date: December 13, 2005

WARNER NORCROSS & JUDD LLP

By 
William K. Holmes (P15084)
John J. Bursch (P57679)
Gregory M. Kilby (P68266)
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
(616) 752-2000
Counsel for Defendant/Appellant

1199665

ADDENDUM

H

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern
 Division.

FLOWER CAB COMPANY, Checker Taxi
 Company, Inc., and Yellow Cab Company,
 Plaintiffs,

v.

Karen PETITTE, Individually and as Commissioner,
 Department of Consumer
 Services of the City of Chicago, and the City of
 Chicago, Defendants.

No. 82 C 4538.

July 21, 1987.

MEMORANDUM OPINION AND ORDER

NORDBERG, District Judge.

*1 In July of 1982, the plaintiffs instituted this action pursuant to 42 U.S.C. § 1983 to contest the Commissioner of the Department of Consumer Services of the City of Chicago's ("the Commissioner") unilateral imposition of a moratorium on the transfer of taxicab licenses. Plaintiffs Checker Taxi Company, Inc. ("Checker") and Yellow Cab Company ("Yellow") were contractual sellers of the taxicab licenses, and plaintiff Flower Cab Company ("Flower") was a prospective purchaser of the licenses. On March 27, 1987, this court granted Checker and Yellow's motion for summary judgment with respect to Count I of the complaint, which alleged that the imposition of the moratorium violated plaintiffs' due process rights under the Fourteenth Amendment to the United States Constitution. One month later, Kenneth Cooper, another prospective purchaser of a 1982 taxicab license, filed a petition to intervene "individually and on behalf of all persons similarly situated" pursuant to Fed.R.Civ.P. 24(a) or (b). The City strongly objects to this petition to intervene. For the reasons set forth below, the court finds that Cooper's petition does not meet the timeliness requirements of Rule 24, and denies his petition to intervene.

Procedural Background

The factual and procedural background of this

lawsuit is set forth in the court's March 27, 1987 memorandum opinion and order:

The underlying facts of this case are undisputed. Checker is one of the largest taxicab operators in the City of Chicago. At the time of the events in question, it owned 1,500 of the City's 4,600 taxicab licenses. In mid-1981, it decided to assign some of its licenses pursuant to the existing procedure set forth in chapter 28 § 28-9.1 of the Municipal Code of the City of Chicago. Checker notified the City of its plan to assign a minimum of three hundred licenses in July of 1981, and frequently conferred with City officials over the next six months to discuss the assignments (Feldman Aff. Ex. A). On February 10, 1982, Karen Petite, the Commissioner, wrote to Checker indicating approval of the contemplated assignments (Feldman Aff. Ex. B). Between March and June of 1982, Checker attended several meetings with City officials. At no time did the City give any indication that it would seek to prevent or prohibit the contemplated assignments. On July 9, 1982, Checker representatives met with then Mayor Jane Byrne, the Commissioner, and members of the City's Corporation Counsel, none of whom mentioned any disapproval of the assignments or possible impediments to the proposed transfers (Feldman Aff. ¶¶ 5-9).

On July 13, 1982, Checker contracted to assign thirteen taxicab licenses to Flower Cab Company ("Flower"). Flower filed applications for processing the assignments with the Commissioner two days later. The Municipal Code of the City of Chicago, chapter 28, § 28-9.1 permitted assignment of these licenses if the assignee met certain standard qualifications. These applications generally required two to five days to process. The routine nature of the processing of assignments is evidenced by the fact that, in the three years prior to Flower's application, the City had processed every application for assignment filed with the Commissioner.

*2 An ordinance prohibiting the sale, transfer or assignment of any taxicab licenses was introduced in the City Council on the same day that Flower filed its applications with the Commissioner. On July 16, 1982, the Commissioner announced a moratorium on the processing of all applications for assignment and refused to consider Flower's applications because of the pendency of the ordinance. As a result, Flower

and Checker filed this action pursuant to § 1983 for injunctive relief.

This court issued a preliminary injunction on July 26, 1982, ordering the Commissioner to process Flower's applications by August 6, 1982, in the ordinary course of its established procedure, thereby returning the parties to the status quo prior to the moratorium. The Seventh Circuit granted the City's motion for a stay pending appeal, *Flower Cab Company v. Petite*, 685 F.2d 192 (7th Cir.1982), and denied plaintiffs' subsequent motion to vacate and rehear *en banc*. *Flower Cab Company v. Petite*, No. 82-2208 (7th Cir. Aug. 20, 1982) (unpublished order).

On September 14, 1982, the City Council conducted a hearing on the proposed ordinance. Plaintiffs were afforded the opportunity to participate in the hearing. At the hearing, the Commissioner testified that the new ordinance was drafted "in response to a plan by one of the cab companies [Checker] to sell its medallions at prices of up to \$15,000 per medallion, a matter which was viewed by at least some as windfall profits for the cab companies." (Transcript of September 14, 1982 Hearings Before the Committee on Local Transportation, at 7). The City Council passed the proposed ordinance on September 15, 1982. The ordinance contained several amendments to the taxicab licensing procedure; the most significant changes for the purposes of this lawsuit are the repeal of chap. 28 § 28-9.1 and the creation of a new provision retroactively banning all transfers of licenses as of July 15, 1982, the date of the moratorium.

The Seventh Circuit vacated this court's July 26, 1986 preliminary injunction in an unpublished order of October 7, 1982. *Flower Cab v. Petite*, No. 82-2208 (7th Cir. October 7, 1982) (unpublished order). Noting the change in circumstances created by the passage of the September 15 amendments, the court remanded the action to this court to consider the validity of the new ordinance and its effect on this litigation. On remand, the plaintiffs filed an amended complaint attacking the validity of the ordinance, and the court granted plaintiffs' motion to add Yellow Cab Company as a party plaintiff.

The plaintiffs then renewed their motion for a preliminary injunction, and the defendants filed a motion to dismiss the amended complaint. The court denied both motions in a memorandum opinion and order entered June 17, 1983. With respect to the motion to dismiss, the court held that Count I of the

amended complaint adequately stated a cause of action under § 1983 and that the ordinance did not moot the amended complaint. See *Flower Cab Company v. Petite*, No. 82 C 4538, slip op. at 3-9 (N.D.Ill. June 17, 1983) ["*Flower Cab I*"]. The court also denied plaintiffs' motion for a preliminary injunction, finding that the plaintiffs had failed to establish that they had no adequate remedy at law and they would be irreparably harmed if an injunction did not issue. *Id.* at 12-14.

*3 *Flower Cab Company v. Petite*, No. 82 C 4538, slip op. at 2-5 (N.D.Ill. March 27, 1987) (footnotes omitted) ("*Flower Cab II*"). The June 17, 1983 order also denied the motion to dismiss Count II, which alleges that the September 15, 1982 ordinance creates an unconstitutional impairment of contract. *Flower Cab I*, slip op. at 9-12.

The court's March 27, 1987 memorandum opinion and order held that the taxicab companies' interest in the licenses and their transferability constituted a protectable property right protected by the Fourteenth Amendment. *Flower Cab II*, slip op. at 7-17. The court also held that the Commissioner's unilateral imposition of this moratorium violated Checker and Yellow's rights to substantive and procedural due process. [FN1] *Flower Cab II*, slip op. at 17-22. The court reiterated its June 17, 1983 holding that plaintiffs were not entitled to injunctive relief from the unconstitutional moratorium, and scheduled a hearing for a determination of the damages stemming from the moratorium. *Flower Cab II*, slip op. at 22-24. The parties were in the process of preparing their evidence on the damages issue when Cooper filed his petition to intervene.

Petition To Intervene

Cooper seeks leave to intervene in this action either as of right under Fed.R.Civ.P. 24(a), or permissively under Fed.R.Civ.P. 24(b). [FN2] Cooper's proposed complaint seeks to convert this individual suit instituted by two plaintiff cab companies [FN3] into a huge class action, with over five hundred proposed class members. A party seeking to intervene as of right must establish (1) that his application is timely; (2) that he has an interest in the property or transaction that is the subject of the lawsuit; (3) that disposition of the action will impair his ability to protect his interest; and (4) that his interest is not adequately represented by the existing parties to the lawsuit. *United States v. City of Chicago*, 798 F.2d 969, 972 (7th Cir.1986). "Failure to satisfy any one of these requirements is sufficient grounds to deny [the motion to intervene.]" *Id.* The City's primary

objection to intervention is that Cooper's motion, filed four years and nine months after this litigation was commenced, cannot satisfy Rule 24's "timeliness" requirement.

In NAACP v. New York, 413 U.S. 345, 365-66, 93 S.Ct. 2591, 2602-2603 (1973), the Supreme Court held:

Intervention in a federal court suit is governed by [Rule] 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be 'timely.' If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on appeal.

*4 See also City of Bloomington, Indiana v. Westinghouse Electric Corp., No. 85-2881, slip op. at 6-7 (7th Cir. June 19, 1987); 7C Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1996 at 422-23. The purpose of the timeliness requirement is to "prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." United States v. South Bend Community School Corp., 710 F.2d 394, 396 (7th Cir.1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707 (1984). This Circuit follows a four-part test to determine whether an application to intervene meets the timeliness component of Rule 24:

'[T]he length of time the intervenor knew or should have known of his or her interest in the case; the extent of prejudice to the original litigating parties from the intervenor's delay; the extent of prejudice to the would-be intervenor if his or her motion is denied; and any unusual circumstances.'

City of Bloomington, slip op. at 7, quoting United States v. Kemper Money Market Fund, Inc., 704 F.2d 389, 391 (7th Cir.1983). See also United States v. City of Chicago, 798 F.2d 969, 975 (7th Cir.1986); South v. Rowe, 759 F.2d 610, 612 (7th Cir.1985). Applying these factors to the present case, the court agrees with the City that Cooper's motion clearly fails to satisfy Rule 24's requirement of "timeliness."

1. Length of Time Cooper Knew of His Interest

Cooper alleges that, like Flower, he entered into a contract to purchase a medallion shortly before the moratorium was announced. His application for a transfer was denied as a result of the moratorium, and the City returned his assignment documents to him on July 16, 1982. In November of 1982, he received a refund for the initial deposit made in contemplation of obtaining a medallion. He admits that his constitutional claims against the City arose in July of 1982; yet he chose to wait until April of 1987 to assert his claim.

It is clear that, if Cooper attempted to file an action independent of this suit, it would be barred by the statute of limitations. This action is based on alleged violations of 42 U.S.C. § 1983. In Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938 (1985), the Supreme Court held that § 1983 suits are governed by the state statute of limitations for personal injury suits. In Illinois, the statute of limitations for personal injury suits is two years. Ill.Rev.Stat. ch. 110, ¶ 13-202. Prior to Wilson, the Seventh Circuit had held that § 1983 suits were subject to Illinois' five year limitations period for "actions not otherwise provided for." Beard v. Robinson, 563 F.2d 331, 334 (7th Cir.1977), cert. denied, 438 U.S. 907, 98 S.Ct. 3125 (1978). Recently, in Anton v. Lehpamer, 787 F.2d 1141 (7th Cir.1986), the court discussed the retroactive applicability of Wilson to claims which arose before that decision was issued. The court held that, "in Illinois, a plaintiff whose § 1983 cause of action accrued before the Wilson decision, April 17, 1985, must file suit within the shorter period of either five years from the date his action accrued or two years after Wilson." Anton, 787 F.2d at 1141, 1146.

*5 In the present case, Cooper's class claims arose at the same time the plaintiffs' claims arose--when the moratorium was announced in July of 1982. However, unlike Flower and Checker, he did not file a lawsuit to vindicate his rights; nor did he follow Yellow's example in requesting to be added as a party plaintiff after the Seventh Circuit remanded this action in the fall of 1982. Under the Anton decision, he should have filed suit within the shorter period of July 16, 1987 or April 17, 1987. Because April 17, 1987 is the cut-off under Anton, Cooper's complaint, filed on April 27, 1987, is barred by the statute of limitations, and could not be filed as a separate action. [FN4]

Cooper argues, however, that timeliness in terms of the statute of limitations and timeliness under Rule

24 are two unrelated concepts. According to Cooper, an intervenor's complaint, if allowed, will date back to the filing of the original complaint; and, since Flower and Checker filed their lawsuit within days of the moratorium, their promptness precludes the City from raising any limitations defense against Cooper and his class.

Cooper's "relation-back" argument cannot be reconciled with the Supreme Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756 (1974). In *American Pipe*, the State of Utah instituted a federal antitrust class action on behalf of itself and a class of other public bodies and agencies eleven days prior to the expiration of the statute of limitations. Within eight days of the district court's denial of plaintiffs' class certification motions, several putative class members filed motions to intervene in the action. The district court denied leave to intervene based on the statute of limitations, and the appellate court reversed. The Supreme Court held that the intervenors were not barred by the statute of limitations, because "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *American Pipe*, 414 U.S. at 553, 94 S.Ct. at 766.

The Court reasoned that this limited tolling of a limitations period serves to prevent a multiplicity of lawsuits during the pendency of a class certification motion, while preserving the essential policies underlying limitations periods. It held:

[S]tatutory limitation periods are 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' The policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights' are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the *number and generic identities* of the potential plaintiffs who may participate in the judgment. *Within the period set by the statute of limitations, the defendants have the essential*

information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.

*6 *American Pipe*, 414 U.S. at 554-555, 94 S.Ct. at 766-67 (citations omitted) (emphasis supplied). See also *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352-53, 103 S.Ct. 2392, 2397 (1983). [FN5]

It is clear that, if Cooper's assertion regarding the relation-back of intervenor's complaints were correct, the Supreme Court's entire discussion in *American Pipe* would be unnecessary. The Court would not need to create a tolling principle if the intervenor's complaint simply related back to the filing of the original complaint. The Court held that, since the original plaintiffs filed eleven days prior to the expiration of the limitations period, the intervenors had eleven days from the denial of the class certification motion to file their motions to intervene. Thus, the *American Pipe* decision implicitly rejects the notion that statutes of limitation are not an appropriate consideration on a motion to intervene.

The tolling principles set forth in *American Pipe* cannot assist Cooper's claim, however, because this lawsuit was not filed as a class action. The plaintiffs in this lawsuit have never purported to represent anyone's interests but their own. It is fair for the City to assume that other individuals allegedly injured by the moratorium would have to file lawsuits to vindicate their interests within the applicable statutes of limitations. Yellow joined the action in 1982 to protect its rights; Cooper should have done the same. Instead of following Yellow's lead, [FN6] however, Cooper sat on his class claim for over four years. He should not be able to use the doctrine of intervention to circumvent his dilatory approach to this litigation.

Even if the statute of limitations did not bar Cooper's claims, however, the court finds that his delay of nearly five years to seek intervention clearly demonstrates the "untimeliness" of his claims for the purposes of Rule 24. In an attempt to excuse his extreme tardiness, Cooper asserts that a motion to intervene before the court's ruling on the plaintiffs' motion for partial summary judgment would have been premature, because he did not really "know" of the viability of his claims until this court granted their motion for partial summary judgment. According to Cooper, it was appropriate for him to postpone

attempts at intervention because he did not know whether the court would recognize these claims; and if the court had denied the motion for summary judgment, these claims would have been moot.

Cooper does not cite any cases where the courts have permitted a private plaintiff to stand on the sidelines until another plaintiff has established his claim for him. This argument ignores the fact that this court recognized the viability of these claims in *July of 1983*, when it denied the City's motion to dismiss plaintiffs' § 1983 claims. Furthermore, the court notes that it was the *plaintiffs* who filed the motion for partial summary judgment, not the defendants. Even if the court had denied this motion, it would not necessarily have mooted Cooper's constitutional claims. Accordingly, the court finds that the pendency of a motion for partial summary judgment provides no excuse for Cooper's tardy filing of this motion to intervene. Cf. *Commoner v. du Pont*, 501 F.Supp. 778, 786 (D.Del.1980) (denying motion to intervene filed after plaintiff's motion for summary judgment was denied). Cooper knew of his claims in July of 1982. He cannot sit back and let other private plaintiffs do all the work, and then seek to piggyback his claims onto theirs. [FN7] This motion to intervene should have been filed--if at all-- shortly after the initial suit was filed, or, at the very latest, when the court denied the City's motions to dismiss in July of 1983. See *Culbreath v. Dukakis*, 630 F.2d 15, 21 (1st Cir.1980) (prior court decisions and publicity associated with the case indicate intervenors had sufficient notice of their legal interest in lawsuit). Cooper has no excuse for waiting so long to file his motion, especially when it is clear that he has known of his interest in this litigation since 1982. See *City of Bloomington, Indiana v. Westinghouse Electric Corp.*, slip op. at 8 (intervention sought two years after knowledge of suit found untimely).

2. Prejudice to Original Litigating Parties Caused by Delay

*7 Cooper alleges that, since his claims are identical to those filed by Flower, there would be no prejudicial delay associated with his intervention in this lawsuit. This assertion ignores the fact that Cooper's complaint, if allowed, would convert a complex civil rights action involving three plaintiffs into a class action lawsuit with over five hundred members. Discovery in the original action has been completed, liability has been determined, and the parties have a briefing schedule for the damages phase of the case. If the motion to intervene is permitted, the original plaintiffs will suffer very

significant additional delays in the resolution of their claims. This delay is a form of "prejudice" to existing parties. 7C Wright, Miller & Kane, *Federal Practice & Procedure: Civil* § 1916 at 441. Cf. *Culbreath*, 630 F.2d at 21-22.

If this motion to intervene were granted, plaintiffs' damage hearing would be delayed indefinitely, until class certification and collateral estoppel or res judicata motions were filed and decided, and discovery in the class action suit was completed. See *Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir.1987) (motion to intervene filed eight days before discovery completed denied as untimely). At the City's request, the court has already delayed the submission of damages evidence until resolution of this motion to intervene. The plaintiffs have pursued this action diligently and shouldered the burden and expense of litigating these claims since the imposition of the moratorium in 1982. They do not deserve to have their claims needlessly delayed by a group of putative plaintiffs who waited nearly five years to attempt to join their lawsuit. If Cooper had filed his claims earlier, these matters could have been decided in an orderly and expeditious fashion. Instead, he delayed his request for joinder until plaintiffs received a favorable ruling, thereby avoiding the risk of being bound by a decision adverse to his interests. See *American Pipe*, 414 U.S. at 547, 94 S.Ct. at 763 (criticizing such "one-way intervention" in context of a class action). Cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 n. 13, 99 S.Ct. 645, 651 n. 13 (1979) (noting that unexcused failure to join earlier action may preclude use of offensive collateral estoppel). The purpose of intervention is to preserve judicial resources and avoid an unnecessary multiplicity of lawsuits. See *Stallworth v. Monsanto*, 558 F.2d 257, 265 (5th Cir.1977). Cooper's untimely motion to intervene, which would further protract the present litigation, clearly does not fulfill this purpose.

Intervention would also prejudice the City in its defense of these claims. Unlike the situation in *American Pipe*, where the initial complaint informed the defendant of the "number and generic identity of the potential plaintiffs who may participate in the judgment," thereby providing defendants with the "subject matter and size of the prospective litigation," 414 U.S. at 555, 94 S.Ct. at 767, the City has proceeded in this litigation under the assumption that only three plaintiffs were involved. Permitting class action intervention would clearly change the course and complexion of this lawsuit. Although the City was undoubtedly aware of the fact that other people

affected by the moratorium might file suit, this "awareness" does not undercut the prejudice which would result from conversion of this lawsuit into a class action five years after it was filed, and after discovery and liability hearings in the underlying suit have been completed. It would be inequitable to the City to prolong this litigation even further at this late date. See United States v. City of Chicago, 798 F.2d 969, 977 (7th Cir.1986) (intervention prejudicial to the City because it would involve the City in more protracted litigation).

*8 Intervention would also prejudice the interests of the City because it would force the City to defend against a complex class action which is clearly barred by the statute of limitations. Even if the statute of limitations does not, in and of itself, bar Cooper from filing this class action, asserting a time-barred claim at this late date still constitutes unfair prejudice to the City. The City has a right to assume that, once the limitations period has expired, it will not be subject to any other claims arising out of its alleged unconstitutional actions. A putative plaintiff whose claim is similar to one in the process of litigation cannot allow his claim to expire, and then expect to join diligent plaintiffs simply because his claim is similar to theirs. Intervention is not designed to encourage or condone such dilatory action. Accordingly, the court finds that prejudice to the existing parties counsels against permitting Cooper to bootstrap his class claims to the private claims filed--and litigated--by Flower, Checker and Yellow.

3. Prejudice to the Applicant if Intervention is Denied

If intervention is denied, Cooper will not be able to advance his claims in another proceeding because the statute of limitations bars him from litigating his class claims independent of this lawsuit. The loss of his claim does not constitute "prejudice" under Rule 24, however. Cooper's dilatory actions caused this claim to expire. In the present case, Flower, Checker and Yellow never purported to represent anyone's interests but their own. It was foolhardy for Cooper to assume that other private parties would fight his battle for him, and somehow prevent the statute of limitations from running against his class claims. See United States v. Jefferson County, 720 F.2d 1511, 1516-17 (11th Cir.1983) ("[intervenors], having made an apparently ill-advised decision to rely on others to advance their interests, knowing that they could be adversely affected, cannot now be heard to complain."); Dodson v. Salvitti, 77 FRD 674, 677 (E.D.Pa.1977) (intervenor should have acted

promptly because there was no duty on the part of existing defendants to protect his interests). In short, the only "prejudice" to Cooper that results from the denial of this motion is the fact that the court has denied him the opportunity to file a time-barred lawsuit against the City. [FN8] This "prejudice" is insufficient to justify his extreme tardiness in filing a motion to intervene. See also United Airlines, Inc. v. McDonald, 432 U.S. at 397- 403, 97 S.Ct. at 2471-2474 (Powell, J., dissenting). [FN9]

4. Unusual Circumstances For or Against Intervention

There are no unusual circumstances which would warrant intervention at this time. Cooper has not presented any valid justification for his delay in seeking intervention. The age and posture of this lawsuit both provide strong reasons for denying his motion to intervene as untimely.

Conclusion

Cooper filed this motion to intervene on behalf of a class nearly five years after the City imposed its moratorium on the transfer of taxicab licenses. For the reasons set forth above, the court concludes that Cooper's motion not only fails to satisfy the statute of limitations for his § 1983 claims, it also fails to meet the timeliness requirement of Rule 24. Accordingly, the court denies Cooper's motion to intervene.

FN1. Although Flower is still a plaintiff of record in this case, it did not join the motion for partial summary judgment filed by Checker and Yellow. See Flower Cab II, slip op. at 5 n. 7.

FN2. Fed.R.Civ.P. 24 provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's

claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene....

Cooper's motion to intervene requests intervention as of right pursuant to Rule 24(a), or alternatively, permissive intervention under Rule 24(b).

FN3. Yellow did not join the suit until after the Seventh Circuit's remand to the District Court in late 1982. *Flower Cab II*, slip op. at 5.

FN4. Cooper obviously knew that his claim against the City arose when he was denied a transfer, and he admits knowledge of the pendency of this action since 1982.

FN5. In *Crown Cork*, the Supreme Court held that the tolling period set forth in *American Pipe* was equally applicable to timely individual suits filed after denial of the class certification motion.

FN6. Cooper remarks that, "[a]lthough Yellow was joined as a party plaintiff after the October, 1982, Court of Appeals decision, it is curious that neither the parties nor the Court, sua sponte, took advantage of Rule 19, F.R.C.P., to bring into action all of the parties who had an interest in the subject matter." Mem. in Supp. of Pet. to Intervene, at 3. This observation ignores the fact that Cooper and his class are neither necessary nor indispensable to this action. Cooper is responsible for taking the initiative to vindicate his rights. The original parties and the court had no duty to suggest their joinder merely because they might be similarly affected by the moratorium.

FN7. Cooper argues that this "knowledge"

factor should be judged not from the time the complaint was filed, but from the time that he learned that the existing parties were no longer representing his interests. See *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir.1977). In *Stallworth*, a group of white employees adversely affected by a settlement of an employment discrimination case sought to intervene after the court approved the settlement. The Fifth Circuit held that their application was timely, because they moved to intervene shortly after they learned that the settlement with black plaintiffs adversely affected their employment relationship with Monsanto. Prior to the entry of the settlement, they were unaware of the impact the litigation would have on their legal interests. *Stallworth*, 558 F.2d at 267.

Unlike the *Stallworth* intervenors, however, Cooper has known of his alleged interest in his litigation since its commencement. He knew that, if he intervened, an adverse ruling in *Flower* could, through the application of res judicata, affect his interest in obtaining relief from the City. He alleges that he relied on Flower (another prospective buyer) to represent his interests for him, and he did not realize that Flower was not representing his interests until he learned, through the March 27, 1987 order, that Flower did not join Yellow and Checker's motions for partial summary judgment. This "excuse" is untenable for three reasons. First, the court's order of July 22, 1983, which set a briefing schedule for the motion for partial summary judgment, clearly states that the motion was filed on behalf of Checker and Yellow only. Thus, even if Cooper were relying on Flower to represent him, this order should have alerted him to the fact that Flower had not joined in the motion. Second, the fact that Flower did not join this motion does not mean that it is no longer a plaintiff in this case. Flower will continue to be a plaintiff until the court dismisses it from the lawsuit. Finally, Cooper has not alleged any justification for his supposition that Flower, a private party, was representing his interests at any time during this lawsuit. The fact that Flower is also a frustrated purchaser of a taxicab medallion does not mean that it had an obligation in this lawsuit to represent any interests other than its own. It did not seek

class certification. Thus, the fact that Flower did not join the motion for summary judgment really has no bearing on when Cooper learned that he had an interest in this litigation.

674, 677 (E.D.Pa.1977).

Not Reported in F.Supp., 1987 WL 14715 (N.D.Ill.)

END OF DOCUMENT

FN8. Cooper also alleges that his interests will be prejudiced by the collateral estoppel effect of the orders entered in the main action. If Cooper was so concerned with the collateral effects of the *Flower* litigation, then he would have sought joinder in this action much earlier. His allegation of prejudice is inherently inconsistent with his claim that it would have been inappropriate for him to join the action prior to the court's resolution of the plaintiffs' motion for partial summary judgment. Thus, instead of joining the action before the court's ruling (thereby binding himself to the judgment), Cooper apparently waited for favorable results in the *Flower* litigation before seeking to align his claims with it. Any adverse collateral effects stemming from the *Flower* litigation are the result of Cooper's inaction, not the court's denial of his intervention request. Accordingly, the court concludes that this assertion of prejudice does not support allowing Cooper to intervene in this action.

FN9. This action is also distinguishable from *United Air Lines, Inc. v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464 (1977). In *United Air Lines*, the plaintiff, a putative class member, did not seek intervention after the district court denied the class certification motions. She moved to intervene after the district court entered final judgment and it became clear that the named plaintiffs did not intend to file an appeal challenging the denial of the class certification motion. The Supreme Court held that "the intervention [for the purposes of appeal] was timely, because "as soon as it became clear to [her] that the interests of the unnamed class members would no longer be protected by the named class representative, she promptly moved to intervene to protect those interests." *Id.* at 394, 97 S.Ct. at 2470. In the present case, it should have been clear to Cooper from the beginning that this was *not* a class action case, and he could not *assume* that the private plaintiffs were representing his interests as well as their own. See *Dodson v. Salvetti*, 77 F.R.D.